1920.

Present: Ennis J. and Loos A.J.

SANCHI APPU *v.* JEERIS APPU.

307—D. C. Tangalla, 1,697.

Res judicata—*Dismissal of partition action—Subsequent action for declaration of title.*

The dismissal of plaintiff's action for partition on the ground that he had neither paper title nor title by prescription was held in the circumstances to be no bar to a subsequent action for declaration of title between the same plaintiff and defendant.

THE plaintiff-appellant instituted this action to be declared entitled to 13/28 shares of a piece of land and to planter's shares of certain plantations, for damages, and costs as against the twenty-first defendant-respondent.

The other defendants were made parties as they were co-owners.

The twenty-first defendant filed answer stating, *inter alia*, that the decree in D. C. Tangalla in case No. 952 was a bar to the plaintiff claiming any shares of the land, and that as a matter of fact only the twenty-first defendant and some others were entitled to the whole land. The District Judge upheld the objection.

The judgment of the District Judge in D. C. Tangalla, 952, was as follows :—

The plaintiff seeks a partition of four allotments of land, which he calls Wewehena, Bogahahena, Arehena, and Ketakelagahahena, depicted in the survey made by Mr. Anthonisz as lots A and B. According to him one Mathes was the original owner. He had seven children . . . . .

Plaintiff, therefore, claims half of the land comprised within lots A and B and certain shares of the plantations thereon.

His counsel wished to produce two deeds dated 1835 and 1836 in favour of the original owner Mathes. This was objected to by the opposite side on the ground that the deeds were not registered. These deeds are not originals, and, therefore, though they were annexed to plaintiff's deed (P 1), cannot be received in evidence. Nor is there any proof that the originals were registered. I cannot, therefore, admit them into evidence. Then plaintiff will, therefore, have to fall back upon possession to establish title. One of his witnesses, Don Mathes, states he cleared Arehena for plaintiff's father. The fourteenth defendant, the value of whose evidence is discredited by his being in Court when the previous witnesses gave evidence, states he cleared Bogahahena fifteen years ago for his wife, and the paraveni share of the crop was divided amongst plaintiff's predecessors in title. In cross-examination he admitted that since that time he did not go near the land. The next witness is plaintiff's brother, who says his grandfather was the owner of the four chenas, and that his father, uncles, and aunts took the paraveni share of their produce for twenty years.

It will thus be seen that only one witness, and that plaintiff's own brother, speaks of possession regarding all four chenas. As regards Arehena, the defendants, thirty-seventh, fortieth, and forty-third, do not claim it, and state it is included in lot B, which they do not claim.

A comparison of the plan attached to P 12, which is the certificate of quiet possession in plaintiff's favour, with Mr. Anthonisz's plan will show that Arehena claimed by plaintiff is the southern portion of lot B.

It is admitted that there are several Bogahahenas near the block A in dispute, and there is no evidence before the Court that the Bogahahena referred to by plaintiff and his witnesses is included in lot A. This is plaintiff's own fault. He failed to produce his title plan No. 190,774 to the surveyor, Mr. Anthonisz, nor has he done so in this case. He has done this intentionally, for I venture to think that that plan refers to Bogahahena, which is said to be to the north of Arehena and to the north-west of lot A, that is to say, it is altogether outside A, and includes only the northern portion of B. The chief disputants in this case are the thirty-seventh, fortieth, and forty-third defendants, who claim the whole of lot A and disclaim title to B. Of the other defendants, some agree to the partition and others disclaim title.

The plaintiff has failed to prove title in Mathes, the alleged original owner, and also possession in himself and his predecessors in title.

I further hold that plaintiff should not have brought this case under the Partition Ordinance. He should have brought an action to vindicate title.

I dismiss plaintiff's case, with costs.

He will pay costs of thirty-seventh, fortieth, and forty-third defendants.

ALLAN BEVEN,
District Judge.

On appeal, the Supreme Court delivered the following judgment :—

HUTCHINSON C.J.—

The plaintiff sues for partition of two lands marked A and B in the plan filed in the case. The District Court dismissed his action because he had not proved his title. The only respondents to his appeal are the thirty-seventh, fortieth, and forty-third defendants; they disclaimed title to B, but claimed the entirety of A. This appeal relates, therefore, only to A.

The plaintiff alleged that he obtained the shares which he claimed by transfer from some of the heirs of Don Mathes, who, he said, was the former owner of the whole land ; and he also claimed them by posession for the period of prescription. In proof of the ownership of Mathes he tendered in evidence copies of two deeds of transfer to Mathes, No. 2,064 dated December 16, 1835 (marked P 11), and No. 3,021 dated February 23, 1836 (marked P 10). These are certified copies from the duplicates filed of record in the Registrar-General's Office. He also put in evidence a certified copy undated, or part of an old case action No. 1,811 in the District Court of Tangalla, this is marked P 2, and consists of (1) the libel in which the plaintiffs say that they are entitled as mortgagees of certain lands to the paraveni share of the crops, and that the defendants have wrongfully taken some of that share; (2) the answer of the first defendant, Mathes, in which he says that the said lands belong to him by virtue of the deeds which he files ; and (3) copies

1920.

Sanchi Appu v. Jeeris Appu

of translations of the two deeds, Nos. 2,064 and 3,021. The defendants objected to the admission of P 10 and P 11 on the ground that they were not registered as required by Ordinance No. 6 of 1866. The District Judge said that he would make his order on this objection after the case had been heard. In his judgment he ruled that P 10 and P 11 were not admissible because they are not originals, and because there was no proof that the originals were registered.

In support of the appeal the plaintiff's counsel cited the judgment of this Court in 305—D. C. Ratnapura, 1,111, given on November 10, 1903, in which it was held that the Ordinance of 1866 did not apply to a sannas, which before the Ordinance came into force had been the subject of a judicial trial, and had been made part of the record, and had been pronounced by the decree to be genuine, and had been at the time when the Ordinance was enacted, and continuously thereafter until the expiration of the time limited for registration lying among the records of the District Court.

In the present case, however, there is no evidence that these deeds had been adjudicated upon, or that they were in the record when the Ordinance was enacted. In my opinion they were rightly rejected.

The Judge also found that the plaintiff had not proved title by prescription, and it is not now contended that that finding was wrong.

The appeal, therefore, fails as to A, and the other defendants who are interested in B are not made respondents.

The appeal must be dismissed with costs.

MIDDLETON J.—I agree.

A. St. V. Jayawardene, for plaintiff, appellant.

Bartholomeusz, for twenty-first defendant, respondent.

March 4, 1920. ENNIS J.—

This was an action *rei vindicatio*. The appeal is from the dismissal of the claim on the ground that a judgment in a previous case was *res judicata*. The previous case was partition action No. 952, D. C. Tangalla, in which the plaintiff sought to partition the land in dispute, and the twenty-first defendant, who is the respondent to this appeal, was the thirty-seventh defendant in that case. The partition case related to two lots, Bogahahena and Arehena. The thirty-seventh defendant disclaimed title to Arehena, and he put the plaintiff to the proof of his title to Bogahahena. The learned Judge in that case dismissed plaintiff's action, on the ground that he had failed to establish either his paper title or a title by prescription. The judgment did not go into the relative merits of the claims of the plaintiff and the thirty-seventh defendant. The plaintiff, who sought to partition, failed because he could not establish his own title, and the Judge further remarked that his proper action would have been a *rei vindicatio* action, in view of the fact that he was aware that the thirty-seventh and the fortieth defendants were contesting his title. So far as we are aware in this case, there is nothing to show that the thirty-seventh

defendant in the partition action adduced any evidence at all in support of his title. It is impossible, therefore, to say that the decision in that partition action was relative between the plaintiff and the thirty-seventh defendant. In my opinion, therefore, the learned Judge was wrong in holding that the partition was *res judicata*.

I accordingly allow the appeal, and send the case back for further proceedings. The appellant will be entitled to the costs in the District Court of the trial of the issue.

Loos J.—I agree.

Appeal allowed.